TONG SEAK KAN & ANOR

v.

LOKE AH KIN & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL RAHMAN SEBLI J
[CIVIL SUIT NO: 23NCVC-139-10-2012]
17 APRIL 2014

CIVIL PROCEDURE: *Judgments and orders - Setting aside - Application to set aside judgment in default - Writ and statement of claim - Service of cause papers - Whether acknowledged - Whether judgment obtained regularly - Whether application allowed*

TORT: *Defamation - Libel - Cyberspace defamation publication on blog/website - First defendant registered subscriber of blog containing defamatory statements against plaintiffs - Whether first defendant proved on balance of probability that he was not author of publication - Failure to rebut statutory presumption - Whether there was defence on merit - Evidence Act 1950, s. 114A(2) - Whether retrospective in effect*

The first plaintiff, a prominent businessman and his wife, the second plaintiff, sued the first defendant for cyberspace defamation. A judgment in default was then entered against the first defendant. The case went for assessment of damages and a sum of RM600,000 was awarded against the first defendant by the Deputy Registrar. This was the first defendant's application to set aside the judgment in default. The first defendant's complaint was that the writ and statement of claim was sent by AR registered post to the Kulai address when the last known address of the first defendant was the Permas Jaya address. The first defendant did not deny that the Kulai address belonged to him but contended that the plaintiffs should have sent the cause papers to his latest, final and ultimate address. Thus, it was the first defendant's submission that the judgment was obtained irregularly and ought to be set aside *ex-debito justitiae*. Further, the first defendant contended that he had a defence on the merits and a substantive defence to the claim *ie*, that the two blogs allegedly containing the defamatory statements did not belong to him and that he had nothing to do with the publications.

Held (dismissing first defendant's application):

(1) The plaintiffs were entitled to rely on any of the first defendant's last known addresses including his address kept at the National Registration Department unless it could be shown that the plaintiffs knew for a fact that the first defendant could not be reached at the Kulai address and yet proceeded to effect service at that address. Unless the address for service had been pre-determined, his last known address means any of his addresses where he could be reached. Further, once the writ and statement of claim had been sent by AR registered post to any of his last known addresses, it would be *prima facie* proof of service without further proof that the person named in the post had received the writ and statement of claim (*Yap Ke Huat v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor*, refd). In the present case, service of the cause papers at the Kulai address had in fact been acknowledged by returning the 'Akuan Terima' to the plaintiffs' solicitors. There was therefore no merit in the first defendant's contention that the judgment in default was obtained irregularly. (paras 5, 6, 9 & 10)

(2) Confirmation by the service providers, Telekom Malaysia and TM Net, provided proof that the first defendant was the registered subscriber of the two blogs, automatically kicking in the presumption under s. 114A(2) of the Evidence Act 1950 ('the Act'), which was retrospective in effect. The legislative scheme of s. 114A(2) is merely to presume or pre-suppose that the registered owner of the blog is the publisher of the publication and the presumption is rebuttable by proof to the contrary. If a blog or website owner succeeds in proving that he is not the person who published the offending material then the presumption dissipates and s. 114A(2) of the Act loses its bite. (paras 16, 20, 21 & 23)

(3) The law relating to cyber publication was clear. Once the registered subscriber of a blog or website where the offending publication originates from had been positively identified, the burden lay on the registered subscriber to prove on the balance of probability that he was not the author of the publication. For this purpose, it was not sufficient for him to merely put the plaintiff to strict proof of the averments made against him. (para 18)

(4) Not a shred of evidence was produced by the first defendant to prove that he was not the person who uploaded the defamatory statements, let alone to prove that the statements were not defamatory of the plaintiffs or to establish any other defence associated with actions in defamation. He merely denied ownership of the two blogs which had been contradicted by Telekom Malaysia and TM Net. A bare denial without more is incapable of rebutting the statutory presumption, nor does it constitute a defence on the merits. The first defendant failed to show any defence on the merits touching on the real matters in question *ie*, a substantive defence that he did not publish the defamatory statements or, for that matter, any defence at all to deflect the plaintiffs' claim. (paras 24 & 27)

Case(s) referred to:
Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat [1978] 1 LNS 158 FC ***(refd)***
Godfrey v. Demon Internet Ltd [2001] QB 201 ***(refd)***
Lee Chow Meng v. PP [1978] 1 LNS 88 FC ***(refd)***
PP v. Datuk Haji Harun Idris [1976] 1 LNS 96 ***(refd)***
Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 4 CLJ 175 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 14A(4), 114A(2)
Rules of Court 2012, O. 14 r. 1(1), O. 18 r. 19(1)

For the plaintiffs - Ian Shang Kuan; M/s Chin & Partners
For the 1st defendant - Noorliana Hashim; M/s Lau Kok Guan Liana & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli J:

[1] In this age of the internet the old adage that the pen is mightier than the sword can no longer hold true. It is the swashbuckling keyboard that has taken over. This judgment concerns only the first defendant Loke Ah Kin. He was sued by the plaintiffs for cyberspace defamation and judgment in default

had been entered against him on 4 April 2013. The first plaintiff is a prominent businessman from Hong Kong and the second plaintiff is his wife.

[2] The case had gone for assessment of damages and a sum of RM600,000 had been awarded against the first defendant by the Deputy Registrar on 25 July 2013. This is his application, filed on 30 September 2013 to set aside the judgment in default. Two grounds were proffered:

(1) That the judgment was obtained irregularly and ought to be set aside *ex-debito justitiae*.

(2) That he has a defence on the merits.

Whether Judgment Regularly Obtained

[3] The first defendant's complaint is that the writ and statement of claim was sent by AR registered post to No. 759, Jalan Teratai 36/8 Bandar Inderapura Kulai Johor ('the Kulai address') when his last known address was No. 5, Jalan Permas 8/9, Taman Permas Jaya, Johor Bahru ('the Permas Jaya address'). What the plaintiffs did to determine the first defendant's address was to make a search at the National Registration department where the official record shows that the first defendant's address was at the Kulai address. This is also the address printed on the first defendant's identity card.

[4] The first defendant does not deny that this address belonged to him but contended that the plaintiffs should have sent the cause papers to his latest, final and ultimate address, which was the Permas Jaya address. I am unable to accept the argument. It would lead to the following untenable situations:

(a) If the writ and statement of claim was sent to the Permas Jaya address, the first defendant could deny proper service by saying that he was in fact residing at the Kulai address, as shown in his identity card and the record at the National Registration department.

(b) If the writ and statement of claim was sent to his Kulai address he could say that he was in fact residing at the Permas Jaya address.

(c) If the writ and statement of claim was sent to both his Permas Jaya and Kulai addresses he could say that he was in fact not residing at either address but at a third address. It would be a catch-22 situation for the plaintiffs but a winning formula for the first defendant to avoid service.

[5] In my judgment the plaintiffs were entitled to rely on any of the first defendant's last known addresses including his address kept at the National Registration Department unless it can be shown that the plaintiffs knew for a fact that the first defendant could not be reached at the Kulai address and yet proceeded to effect service at that address. That would be a devious act on the part of the plaintiffs to obtain a dubious judgment by default. This court will readily set aside such default judgment if there is evidence of such misconduct by the plaintiffs or his solicitors.

[6] A defendant's last known address does not mean his last known residential address. Unless the address for service has been pre-determined, his last known address means any of his addresses where he could be reached, for instance his office or business address. To avoid abuse of process where service is by post the plaintiff must in his affidavit of service affirm that to the best of his knowledge and belief the defendant could be reached at the address where he served the cause papers. The reasons for his knowledge and belief must be stated. This in my view is necessary to protect unsuspecting defendants from the consequences that flow from their failure to respond to a legal process.

[7] The first defendant alleged that the plaintiffs knew he was residing at the Permas Jaya address because in the affidavit of one Maszieta binti Maarop dated 18 April 2012 filed in connection with the plaintiffs' claim against Telekom Malaysia Berhad ('Telekom Malaysia') and TM Net Sdn Bhd ('TM Net') in the Kuala Lumpur High Court Originating Summons No. 24NCVC-3183-12/2011 the first defendant's address was given as No. 5, Jalan Permas 8/9, Taman Permas Jaya, Johor Bahru, ie, the Permas Jaya address.

[8] I find nothing in the argument as the Permas Jaya address was not his only last known address. In any event the first defendant cannot expect the plaintiffs to rely on an address given by a third party. The question is not whether the plaintiffs knew that the first defendant was residing at Permas Jaya. The question

is whether the first defendant could not be reached at the Kulai address and this fact was known to the plaintiffs. There is no such evidence in this case.

[9] The long and short of the first defendant's argument is that he did not receive the writ and statement of claim. This is of no consequence because once the writ and statement of claim had been sent by AR registered post to any of his last known addresses it would be *prima facie* proof of service without further proof that the person named in the post had received the writ and statement of claim: *Yap Ke Huat & Ors v. Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 4 CLJ 175.

[10] In the present case service of the cause papers at the Kulai address had in fact been acknowledged by returning the 'Akuan Terima' to the plaintiffs' solicitors. There is therefore no merit in the first defendant's contention that the judgment in default was obtained irregularly.

Whether There Is Defence On The Merits

[11] It is axiomatic that if the judgment is regular, it is an inflexible rule that there must be an affidavit showing a defence on the merits: see *Bank Bumiputra Malaysia Bhd v. Majlis Amanah Ra'ayat* [1978] 1 LNS 158; [1979] 1 MLJ 23 FC. A defence on the merits means a substantive defence to the claim and must not be confused with a triable issue which a defendant normally raises in opposing a summary judgment application under O. 14 r. 1(1) or in an application to strike out the defence under O. 18 r. 19(1) of the Rules of Court 2012. These are situations where an appearance or a defence has been filed and judgment has not been entered. In *Osborn's Concise Law Dictionary*, 8th edn. the word "merits" is defined as follows:

> Merits. The real matters in question as opposed to technicalities. An affidavit of merits is an affidavit showing that a defendant has a substantial ground of defence to the action.

[12] Statements posted on the internet are considered as being made in permanent form for purposes of the law of defamation: *Godfrey v. Demon Internet Ltd* [2001] QB 201. The plaintiffs' pleaded case is that the words that the first defendant published on 8 August 2011 at http://michaeltongseakkancriminal.

blogspot.com and at http://michaeltongseakkanimpotent. blogspot.com were defamatory of them both. Amongst the defamatory statements made against the first plaintiff were: A

(1) He is a double-faced husband and businessman.

(2) He has numerous extra marital affairs. B

(3) He is a gangster and wanted by the Malaysian police.

(4) Even though he is a macho gangster he is impotent, unable to sustain an erection and has low sperm count. C

(5) His 'dick' refuses to work the way it is supposed to work.

(6) He is not the father of the child that his present wife gave birth to in May 2010, spiced up with the sarcasm: "Is Isabel the mother? YES. Is Tong Seak Kan the father? HAHAHAHA!!!!!!" D

[13] As for the second plaintiff, the defamatory words against her relate to her alleged immoral relationship with the first plaintiff. No appearance was entered by the first defendant, hence the E judgment in default. On the face of it there can be no argument that the words published in the two blogs were defamatory of the plaintiffs, particularly the first plaintiff. Nothing can be more disparaging than to tell a macho man that he cannot sustain an erection and his 'dick' is not functioning properly. The first F defendant's proposed defence as disclosed in his affidavit in support consists of bare denials, that the two blogs did not belong to him, that he had nothing to do with the publications and that he does not even know the plaintiffs.

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[14] To find out who the culprits behind the blogs were the plaintiffs filed a John Doe action against Google Inc ('Google') in the Superior Court of California USA in case *No. CV 209918 (Tong Seak Kan, et al v. John Doe (Doe 1) et al)*. In compliance with the court order Google traced the two blogs to internet H protocol (IP) addresses 115.132.254.21 and 115.133.226.65. A subsequent search conducted by the plaintiffs on the two IP addresses revealed that they were within the IP address blocks allocated to Telekom Malaysia.

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[15] The plaintiffs then commenced proceedings in the Malaysian High Court against Telekom Malaysia and TM Net as the network service providers for an order to compel them to disclose information on the two IP addresses and they succeeded. Pursuant to the High Court Order Telekom Malaysia and TM Net affirmed through the affidavit of Maszieta binti Maarop that the two IP addresses belonged to the first defendant. The only form of challenge mounted by the first defendant against this positive assertion was to say that the evidence is not conclusive. As to how it is not conclusive he did not say a word.

[16] This confirmation by the service providers provides proof that the first defendant was the registered subscriber of the two blogs. This automatically kicks in the presumption under s. 114A(2) of the Evidence Act 1950 ('the Act'), which provides as follows:

> (2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.

[17] The words "publication" and "network service" are defined by sub-s. 14A(4) of the Act as follows:

> (4) For the purpose of this section:
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> (a) "network service" and "network service provider" have the meaning assigned to them in section 6 of the Communications and Multimedia Act 1998 [Act 588]; and
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> (b) "publication" means a statement or a representation, whether in written, printed, pictorial, film, graphical, acoustic or other form displayed on the screen of a computer.

[18] The law relating to cyber publication is therefore clear. Once the registered subscriber of a blog or website where the offending publication originates from has been positively identified, the burden lies on the registered subscriber to prove on the balance of probability that he is not the author of the publication. For this purpose it is not sufficient for him to merely put the plaintiff to strict proof of the averments made against him, as was done by the first defendant in the present case. To come clean he must come up with evidence to convince the court that he was not the person who uploaded the defamatory statements.

Whether s. 114A(2) Retrospective

[19] Counsel for the first defendant argued that s. 114A(2) of the Act does not apply against the first defendant because it only came into force on 31 July 2012 whereas the defamatory statements were published on 8 August 2011, long before the provision took effect. This raises the question whether the presumption applies to acts done before s. 114A(2) came into force.

[20] The general rule is that statutes, particularly amending statutes, are *prima facie* prospective, and retrospective effect is not to be given to them unless by clear words or by necessary implication. This presumption however does not always apply in cases of legislation dealing with procedure or evidence: see *PP v. Datuk Haji Harun bin Idris* [1976] 1 LNS 96; [1976] 1 MLRH 559; [1977] 1 MLJ 14 per Raja Azlan Shah FJ (as he then was). In *Lee Chow Meng v. PP* [1978] 1 LNS 88; [1978] 1 MLRA 607 Suffian LP speaking for the Federal Court said:

> A statute dealing with procedure has retrospective effect, that is, it applies to proceedings begun before and after the commencement of the statute, unless a contrary intention is expressed or clearly implied. This was so stated by Lord Blackburn in *Gardner v. Lucas* [1878] 3 App Cas 582 603.
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> ... it is perfectly settled that if the legislature forms a new procedure, that, instead of proceeding in this form, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.
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> On the other hand a statute dealing with rights has effect only for the future and is not to be construed retrospectively, it does not apply to proceedings begun before its commencement, it only affects proceedings begun after that, unless there is a clear indication to the contrary. This was so stated by Jessel MR in *Re Joseph Suche & Co. Ltd.* [1875] 1 Ch D 48, 50 in the following words:
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> It is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them.

[21] Although the Federal Court was concerned with an amendment to the Courts of Judicature Act 1964 the above observations by Suffian LP are relevant in dealing with amendments to the Evidence Act. Based on the two authorities above it is clear to me that s. 114A(2) of the Act is retrospective in effect. It does not alter the rights of the parties by taking away or conferring any right of action, nor does it create any new liability civil or criminal.

[22] Clearly the legislative scheme of s. 114A(2) is merely to presume or presuppose that the registered owner of the blog is the publisher of the publication and the presumption is rebuttable by proof to the contrary. It is by no means an irrebuttable presumption and neither does it finally determine the publisher's liability or guilt. No one can be found liable in a civil claim nor guilty in a criminal prosecution on account of s. 114A(2) standing alone unless of course there is total failure of rebuttal.

[23] If a blog or website owner succeeds in proving that he is not the person who published the offending material then the presumption dissipates and s. 114A(2) loses its bite. In that sense s. 114A(2) provides a complete defence to the blog owner. However, once the presumption is invoked the only way the registered subscriber can escape liability civil or criminal is by rebutting the presumption.

[24] In the instant case not a shred of evidence was produced by the first defendant to prove that he was not the person who uploaded the defamatory statements, let alone to prove that the statements were not defamatory of the plaintiffs or to establish any other defence associated with actions in defamation. He merely denied ownership of the two blogs which denial has been contradicted by Telekom Malaysia and TM Net. A bare denial without more is incapable of rebutting the statutory presumption, nor does it constitute a defence on the merits.

[25] The first defendant's allegation that the IP addresses belonged to two registered subscribers in Keningau, Sabah and Seremban, Negeri Sembilan respectively has no bearing on the issue as the official service providers have pinpointed him as the registered subscriber of both blogs. In any event the first defendant's evidence on this point cannot be given any weight as

he has not established his competence to testify on the subject. Clearly this is not a matter that any Tom Dick and Harry can speak his mind on with any authority. What the first defendant did according to him was to simply go to the website at WhatisMyIPAddress.com and there he found that the two blogs belonged to the Keningau and Seremban chaps and not him.

[26] But one must be wary of this website as it also teaches how to hide or change IP addresses, the most common of which according to the webmaster is to use a proxy server in one form or another. The "Hide IP" section of the website has, as its logo, the graphic of a man's face wearing dark glasses and sporting very thick moustache which curls upwards at both ends. The alphabets "IP" are hidden in the background by the man's face, which looks mischievous and up to some mischief.

[27] On the facts it is clear that the first defendant has failed to show any defence on the merits touching on the real matters in question, in this case a substantive defence that he did not publish the defamatory statements or, for that matter, any defence at all to deflect the plaintiffs' claim that the statements were defamatory of them. In the circumstances the first defendant's application to set aside the default judgment must be dismissed with costs and I so ordered.